DEPARTMENT OF STATE REVENUE

04-20110245.LOF

Letter of Findings: 04-20110245
Sales and Use Tax
For 2008 and 2009 Tax Years

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ISSUE

I. Advertising Materials – Gross Retail Tax.

Authority: IC § 6-2.5-1-1; IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-4-1; IC § 6-8.1-5-1; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Frame Station, Inc. v. Indiana Dep't of Revenue, 771 N.E.2d 129 (Ind. Tax Ct. 2002); 45 IAC 2.2-1-1; 45 IAC 2.2-3-4; 45 IAC 2.2-4-1.

Taxpayer argues that it is not subject to use tax on the purchase of advertising materials.

STATEMENT OF FACTS

Taxpayer is an S-corporation, doing business in Indiana as a heating and air-conditioning contractor. The Department of Revenue (Department) conducted a sales and use tax audit finding that Taxpayer failed to pay sales or use tax on the price taxpayer paid for direct mail advertising materials. As a result, the Department assessed additional use tax. Taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representative further explained the basis for the protest and submitted additional documents. This Letter of Findings results.

I. Advertising Materials – Gross Retail Tax.

DISCUSSION

Taxpayer contracted with an out-of-state vendor to purchase advertising services. The services consisted of the preparation and delivery of advertising materials, in the form of mailers, coupons and postcards. After the vendor prepared the mailers, coupons and postcards, the vendor mailed the materials to Indiana prospective customers. The advertising services purchased by Taxpayer also included ads and coupons placed on the vendor's Internet website.

The Department concluded that Taxpayer should have paid use tax on the price paid for the advertising materials, including fees paid for services or postage related to those materials.

All tax assessments are prima facie evidence that the Department's claim for the tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. IC § 6-2.5-1-2(a) defines a "retail transaction" as:

> [A] transaction of a retail merchant that constitutes selling at retail as described in IC 6-2.5-4-1 that constitutes making a wholesale sale as described in IC 6-2.5-4-2, or that is described in any other section of IC 6-2.5-4.

IC § 6-2.5-4-1 provides:

> (a) A person is a retail merchant making a retail transaction when he engages in selling at retail.
> (b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:
> (1) acquires tangible personal property for the purpose of resale; and
> (2) transfers that property to another person for consideration.
> (c) For purposes of determining what constitutes selling at retail, it does not matter whether:
> (1) the property is transferred in the same form as when it was acquired;
> (2) the property is transferred alone or in conjunction with other property or services; or
> (3) the property is transferred conditionally or otherwise.
> (d) Notwithstanding subsection (b), a person is not selling at retail if he is making a wholesale sale as described in section 2 of this chapter.
> (e) The gross retail income received from selling at retail is only taxable under this article to the extent that the income represents:
> (1) the price of the property transferred, without the rendition of any service; and
> (2) except as provided in subsection (g), any bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect to the property transferred before its transfer and which are separately stated on the transferor's records. For purposes of this subsection, a transfer is considered to have occurred after delivery of the property to the purchaser.

Use tax is imposed under IC § 6-2.5-3-2(a), which states:

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

45 IAC 2.2-3-4 also proves relevant, which states:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

45 IAC 2.2-4-1 adds that all of the taxpayer's receipts are subject to tax, as follows:

(a) Where ownership of tangible personal property is transferred for a consideration, it will be considered a transaction of a retail merchant constituting selling at retail unless the seller is not acting as a "retail merchant".

(b) All elements of consideration are included in gross retail income subject to tax. Elements of consideration include, but are not limited to:

(1) The price arrived at between purchaser and seller.

(2) Any additional bona fide charges added to or included in such price for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other services performed in respect to or labor charges for work done with respect to such property prior to transfer.

(3) No deduction from gross receipts is permitted for services performed or work done on behalf of the seller prior to transfer of such property at retail.

[Emphasis added.]

Taxpayer argued that, because applicable statutes or regulations do not specifically enumerate graphic design and distribution services, those elements of taxpayer's purchase of services from the vendor should enjoy an exemption from sales or use tax. Taxpayer also asserted that the vendor's display of coupons and other advertising materials pertaining to Taxpayer on the vendor's website as part of the services Taxpayer purchased should not subject the taxpayer to sales or use tax liability.

The Department's audit found that taxpayer's purchase of advertising materials constituted a "unitary transaction" under 45 IAC 2.2-1-1(a). This regulation states that:

For purposes of the state gross retail tax and use tax, such taxes shall apply and be computed in respect to each retail unitary transaction. A unitary transaction shall include all items of property and/or services for which a total combined charge or selling price is computed for payment irrespective of the fact that services which would not otherwise be taxable are included in the charge or selling price.

The regulation derives from IC § 6-2.5-1-1, which states that a "'unitary transaction' includes all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated." A "retail unitary transaction" occurs when a retail merchant purchases tangible personal property in [the retail merchant's] ordinary course of business and then sells that property along with services as a unitary transaction. IC § 6-2.5-1-2.

In Frame Station, Inc. v. Indiana Dep't of Revenue, 771 N.E.2d 129 (Ind. Tax Ct. 2002), the Tax Court held that when the taxpayer charged customers separate amounts for labor and materials for custom framing services, the taxpayer should have collected sales tax on the labor charges. Id. at 131. In arriving at that decision, the court reasoned that resolution of the issue depends upon "whether [Taxpayer's] services were performed before or after it transferred property to its customers." Id. The court found that services performed prior to the transfer of the property are taxable, and services performed after the transfer of the property are taxable to the extent that the services represent a "unitary transaction" and are "inextricable and indivisible" from the property being transferred. Id. Accordingly, the determinative fact is when the services were performed.

Taxpayer entered into an agreement to purchase advertising materials and have those materials delivered to multiple Indiana locations. In effect, the "consumption" of the materials took place in Indiana; Taxpayer's "use" of the advertising materials occurred when the materials were placed in the hands of its prospective Indiana customers, regardless of the method of delivery or costs associated with delivery. The audit correctly concluded that taxpayer bought the advertising materials by means of a unitary transaction. Taxpayer has not presented any evidence showing that taxpayer negotiated for or purchased labor or delivery services separately from the cost of the materials. Taxpayer wanted advertising materials, taxpayer bought advertising materials, taxpayer paid for advertising materials, and these advertising materials were "used" in Indiana.

FINDING

Taxpayer's protest is respectfully denied.

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